Books

THE AUSTRALIA ACTS 1986 by Anne Twomey (2010) Federation Press, Sydney, 512pp, ISBN 978-1-862-87807-5

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This work under review is subtitled 'Australia's Statutes of Independence'. The vast majority of Australians, even many lawyers, would be surprised to learn that 'independence' came so late. The persistence of 'residual links', whereby the Privy Council still entertained appeals from the Supreme Courts of the states on non-federal matters, the Sovereign acted in some matters affecting the states upon advice of British Ministers, a range of Imperial statutes, including (until 1981) the *Merchant Shipping Act 1894* (Imp),[1] continued to apply by paramount force and the 'request and consent' provision in s 4 of the *Statute of Westminster 1931* (Imp) did not extend to the states, was remote from the popular consciousness. The author recounts[2] the reaction of HRH the Duke of Edinburgh, when in Canberra with the Queen for the proclamation on 3 March 1986 of the *Australia Act 1986* (Cth), to the enthusiasm of a Minister in the federal government of the day. The reaction was 'Big deal!'. This, no doubt, was in accord with the Australian zeitgeist.

On the other hand, the 'repatriation' of the *British North America Act 1867* (Imp) by the *Canada Act 1982* (UK) had been attended by great political controversy,[3] as can be seen in the two decisions of the Supreme Court of Canada[4] and one of the English Court of Appeal.[5] This was followed by a series of attempts (marked by the failures of the Meech Lake Constitutional Accord of 1987 and the Charlottetown Accord of 1992) to reconcile the province of Quebec and the aboriginal peoples of Canada to the new constitutional arrangements.[6]

Nothing like this occurred in Australia. The electors were not consulted and there was no referendum or plebiscite, but it has since not been said that for these reasons the outcome, whatever its legal effectiveness, lacked political credibility.

The issue of the *Australian Law Journal* for December 1979 carried the report of an announcement on 13 October 1979 by the Standing Committee of Attorneys-General which identified, as matters requiring further study:

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* Justice of the High Court of Australia.

1 See *Bistricic v Rokov* (1976) 135 CLR 552; *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 434–5.

2 Anne Twomey, *The Australia Acts 1986* (Federation Press, 2010) 1.

3 This is conveniently recounted in Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (McGill-Queen's University Press, 5th ed, 2009) 249–58.

4 *Re Resolution to Amend the Constitution* [1981] 1 SCR 753; *Re Objection by Quebec to Resolution to Amend the Constitution* [1982] 2 SCR 793.

5 *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] QB 892.

6 Peter Hogg, *Constitutional Law of Canada* (Carswell, 4th ed, 1997) 67–71.

(a) the power of State Parliaments to deal with Imperial legislation still applying by paramount force,

(b) the power of State Parliaments to legislate extra-territorially,

(c) appeals to the Privy Council from State Supreme Courts, and

(d) 'channels of communication with the Crown'.[7]

The last-mentioned subject was not remote from the world of practical affairs. In 1973 state governments had petitioned the Queen to refer to the Privy Council, under s 4 of the *Judicial Committee Act 1833* (Imp),[8] a question which was designed to have that body, not the High Court of Australia, determine the *inter se* question of the respective rights of the Commonwealth and states to the seabed adjacent to the states. The Queen, acting on concurring advice of both Commonwealth and British Ministers, decided not to refer the petition.[9] The issue then went ahead for determination by the High Court in 1975.[10] Five years later there erupted in the Correspondence columns of the *Australian Law Journal*,[11] a vigorous and protracted debate between protagonists, including the Commonwealth Solicitor-General (Mr M H Byers QC) and Dr Finnis, respecting the treatment of the 1973 petitions and the place of United Kingdom Ministers in tendering advice in addition to that of the Australian Prime Minister.

The expression 'residual links' invited the question 'links to what?'. An answer, one which the advisers to the Commonwealth and to the state governments appear to have assumed in the initial stages of negotiation for the Australia Acts, would have been 'to the United Kingdom'. But that, as revealed by the narrative unfolded in this book, obscured the legal and political realities of the situation.

There is something to be said for the view that until the recent establishment of the Supreme Court of the United Kingdom and the removal of the highest judges in the country from their positions as members of a committee of the upper chamber of the Parliament, the only separation of powers was within the executive—between what the British are apt to identify by the terms 'the Palace' (a body of advisers headed by the Private Secretary to the Sovereign) on the one hand, and, on the other, 'Downing Street' or 'Whitehall' (identified with the Prime Minister and Cabinet, and the Civil Service, respectively).

Sir William Heseltine (Private Secretary to Prime Minister Menzies 1955–59 and subsequently Deputy Private Secretary to the Queen 1977–86, the period covered by this book, and then Private Secretary and Keeper of the Queen's Archives 1986–90) wrote to *The Times* on 29 July 1986 that '[w]hatever personal opinions the sovereign may hold or may have expressed to her Government, she is bound to accept and act on the advice of her Ministers'. But what was to be done when, with respect to the same subject, the removal of 'residual links', the Sovereign had several sets of Ministers and, in that sense, was a supra-national figure?

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7 (1979) 53 *Australian Law Journal* 805.

8 3 & 4 Will IV, c 41.

9 See *Commonwealth v Queensland* (1975) 134 CLR 298, 334–5.

10 *New South Wales v Commonwealth* (1975) 135 CLR 337.

11 (1981) 55 *Australian Law Journal* 360, 701, 763, 828, 893; (1982) 56 *Australian Law Journal* 316.

There were four sets of 'players' in the events described in this book—the government of the Commonwealth, those of the states, the United Kingdom government in Downing Street and Whitehall, and the Palace.

The author has had the invaluable assistance of access to previously confidential material upon the negotiations of the Australia Acts provided to her by the first three of these players.[12] But she has not, it appears, had direct access to the Queen's Archives.

A leading British authority, Professor Rodney Brazier, in an essay on 'The Monarchy'[13] writes:

> Some matters have to be ignored. In particular, it is not possible to do justice to the sovereign's role in relation to the Empire and the Commonwealth. This is regrettable, partly because the positions of head of the Commonwealth and head of state of Commonwealth realms have given the British monarchy an international dimension which other monarchies lack.[14]

The position of the Sovereign as Head of State outside the United Kingdom varies from country to country and from the position under the 'unwritten' constitution in the United Kingdom. For example, the *Constitution of the Independent State of Papua New Guinea* states (s 82) the request by the people, through the Constituent Assembly, that Her Majesty become 'the Queen and Head of State of Papua New Guinea', and the consent by Her Majesty so to become; the Governor-General is appointed by the Head of State acting in accordance with the advice of the National Executive Council, which is given in accordance with a decision of the Parliament, upon an exhaustive secret ballot to nominate a person for that appointment (s 88).

Federal systems, and not just that of Canada, give rise to particular difficulties respecting the 'divisibility' of the Crown and access to the counsels of the Crown. The Palace, as the author recounts,[15] had been unhappy with the situation established by Whitehall, without involvement of the Palace, for the federal system in Nigeria upon independence in 1960 and continuing until a republic was established in 1963. The regional Premiers in Nigeria tendered advice directly to the Sovereign on appointment of Governors of the regions. The Palace preferred the long-established Canadian system whereby the only source of advice in Canadian matters was the Governor-General.

The position with respect to Australia was complicated by the translation of, or, at least the failure fully to change, the position of the colonies *vis-à-vis* the Imperial authorities when they became states in the new Commonwealth of Australia. This set the scene for the course of events which the author details in this book.

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12 Twomey, above n 2, 62.

13 Published in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (Oxford University Press, 2003) 69-95.

14 Ibid 70.

15 Twomey, above n 2, 468–9.

The Australian states had preserved much of their relationship with the United Kingdom, whereby advice respecting state matters (including Instructions to Governors, and the reservation and disallowance of legislation[16]), was tendered by British Ministers. This system was retained, as the author puts it,[17] 'in order to avoid the perceived greater evil of domination by the Commonwealth'. But, if that link with British Ministers was to go, what was to replace it as the source of advice to the Crown on state matters? Sir Geoffrey Yeend, Secretary to the Department of the Prime Minister and Cabinet, was anxious that his Prime Minister, Mr Hawke, secure the personal acceptance by the Sovereign of the project to end 'residual links'. He saw the particular position in which the Palace was placed, with no clear rules to resolve conflicts in the positions taken by the federal government, by the states, and by Whitehall, represented by the Foreign and Commonwealth Office. Yeend, as the author records from the terms of his memoranda written at the time,[18] was aware that in the situation this presented, the power of personal influence of the Queen and her Palace advisers was substantial.

The Palace, no doubt mindful of what had happened with Nigeria 20 years before, favoured Canberra as the sole source of advice from Australia, as was Ottawa for Canada. Canberra, in general, was of the same opinion, although the Governor-General (Sir Ninian Stephen) had reservations. The Foreign and Commonwealth Office tended to favour its replacement as the source of advice on state matters by the states themselves. But could this not lead to conflicting advice at federal and state levels?

As is now apparent from s 7(5) of the Australia Acts, advice 'in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State'. How was this *modus vivendi* achieved? It seems[19] that this was the result of a misunderstanding, whereby the states and the Commonwealth went ahead on the basis that delphic statements by officials in Whitehall meant that 'direct access' by the states was acceptable, notwithstanding reservations by the Palace. The British then could not back down in face of a common front now presented by all the Australian players.

And what of the Palace? The opposition to 'direct access' by the states was most strongly put by Sir Philip Moore, Sir William Heseltine's immediate predecessor as Private Secretary.[20] In 1984, Heseltine, then Moore's Deputy, told his fellow West Australian, the Solicitor-General Mr Kevin Parker QC, that Moore could not or would not comprehend the concept of a federation in which the Queen had more than one government.[21] It needs to be said that in a well-known passage in *Bank of New South Wales v Commonwealth*,[22] Sir Owen Dixon had indicated an awareness of the problem. At all events, what we do not know is the extent to which informed and wise counsel of Heseltine contributed to the ultimate acceptance by the Sovereign of the *modus vivendi* represented by s 7. Of course, the 'federal' question then reappeared in the United Kingdom itself a decade later.

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16 *Yougarla v Western Australia* (2001) 207 CLR 344, 358–62 [31]–[37].
17 Twomey, above n 2, 466.
18 Ibid 158–9.
19 Ibid 146–50.
20 Moore served as Assistant Private Secretary 1966–72, Deputy Private Secretary 1972–77, and Private Secretary 1977–86.
21 Twomey, above n 2, 164.
22 (1948) 76 CLR 1, 363.

Devolution has produced Ministers for Scotland, as well as for the United Kingdom.

The *Australia Act 1986* (Cth) recited the request to the Parliament of the Commonwealth by all the state parliaments to legislate under s 51(xxxviii) of the *Constitution*. The British statute[23] was enacted upon receipt of the *Australia (Request and Consent) Act 1985* (Cth) and with the concurrence of all the states. In chapter 5 of the book under review, the author asks whether the enactment of the two Australia Acts by the Parliaments at Canberra and Westminster was done out of an abundance of caution, lack of confidence or constitutional laziness, and whether the Imperial statute continues to have normative effect in Australia. To some degree these questions have been considered in a number of recent Australian High Court cases: *Sue v Hill*,[24] *Attorney-General (WA) v Marquet*,[25] and *Shaw v Minister for Immigration and Multicultural Affairs*.[26] The issues the author discusses in chapter 5, as the years pass, may assume the character, as Sir Maurice Byers put it,[27] of fitness 'only for classroom discussion at the close of a languid summer afternoon'. For the present, however, chapter 5 reminds us that the study of constitutional law requires attention to history, statutory interpretation, political philosophy and political realities.[28]

Herein lies a considerable virtue of this book. Too much of the teaching of 'constitutional law' looks only to the decisions of the judicial branch and fails to give students an understanding of the operation of the federal system as a method of government. The attention given by the author to the source materials lying behind the enactment of the Australia Acts has yielded a book which will be a valuable teaching resource and the author is to be congratulated on her work.

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23 *Australia Act 1986* (UK).
24 (1999) 199 CLR 462.
25 (2003) 217 CLR 545.
26 (2003) 218 CLR 28.
27 (1982) 56 *Australian Law Journal* 316, 317.
28 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 37 [12].